Bauer (M) Sdn Bhd v Embassy Court Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-178 OF 2011
AMELIA TEE ABDULLAH J
2 MAY 2012

Evidence — Fresh or further evidence — Principles applied — Plaintiff sued first defendant to produce corporate guarantee issued in its favour by second defendant at first defendant's request — Plaintiff also sought indemnity against second defendant for sums payable by first defendant — Trial concluded but judgment reserved — Arbitration proceedings between parties meanwhile finally held first defendant liable to pay plaintiff certain sum — Whether plaintiff could adduce arbitrator's award as further evidence at trial — Whether defendants prejudiced by plaintiff's application

The plaintiff and the first defendant had referred their disputes over an agreement to an arbitrator who ordered the first defendant to pay the plaintiff a certain sum with interest ('the award'). While the arbitration proceedings were underway the plaintiff filed the instant action seeking specific performance against the first defendant to produce the corporate guarantee it was to have provided in the plaintiff's favour and issued by the second defendant under the agreement. The plaintiff also sought an order that the second defendant indemnify it for such sum the arbitrator ruled was payable by the first defendant to the plaintiff. As the award was only delivered after both parties had completed their submissions in the instant action but before judgment was delivered, the plaintiff applied for leave to adduce the award as further evidence in support of its claim. The defendants objected to the application, inter alia, on the grounds: (i) as the second defendant was not party to the arbitration and had no opportunity to dispute the contents of the award, it would be prejudiced and denied of natural justice if the award was accepted as evidence after conclusion of the trial (ii) as the plaintiff had not applied to reopen its case or call the arbitrator to testify, the second defendant would not be able to cross-examine the arbitrator on the award or rebut his evidence (iii) the award should not influence the court or be binding on the second defendant as the arbitrator had committed serious errors of law in his decision (iv) as the plaintiff had not pleaded the award in its statement of claim the court could not adjudicate on an issue not pleaded (v) the attempt to admit the award was a tactic to improve upon the plaintiff's submissions and defeat the second defendant's defence and (vi) the plaintiff should have adjourned the trial or the closing of its case until after the award had been delivered. The plaintiff, inter alia, said the first defendant was a subsidiary of the second

defendant and two common directors of both the defendants had given evidence at the arbitration.

Held, granting the application and allowing the defendants to recall their witnesses or call fresh witnesses to testify with regard to the evidence in the award:

(1) As the plaintiff had satisfied the three requirements for the reception of fresh evidence set out in *Ladd v Marshall* [1954] 3 All ER 745 the court was of the view this was a fit and proper case to allow the plaintiff to adduce the award (see para 41).

(2) The award, having been delivered on 3 February 2012, was clearly not available either during the hearing of the suit in November 2011 or during the oral submissions in reply on 29 December 2011. It was crucial the award was adduced as part of the evidence at trial as the arbitrator had determined the sum payable by the first defendant to the plaintiff. The court was also of the view the evidence of the award was credible, although it may not be incontrovertible (see paras 34, 35 & 37).

(3) The court was of the view it was not necessary for the plaintiff to have asked for leave to reopen its case in its application. It was implicit in the prayer to adduce the award that the plaintiff's case would have to be reopened since the entire hearing had earlier been completed (see para 40).

(4) The court could not agree with the submission the award could not be accepted as evidence because it was not pleaded in the statement of claim. The award was not pleaded because it was not in existence at the time the statement of claim was filed (see para 35).

[Bahasa Malaysia summary

Plaintif dan defendan pertama telah merujuk pertikaian mereka ke atas perjanjian kepada penimbang tara yang mengarahkan defendan pertama membayar plaintif jumlah tertentu dengan faedah ('award'). Semasa prosiding timbang tara berjalan plaintif memfailkan tindakan ini memohon pelaksanaan spesifik terhadap defendan pertama untuk memberikan jaminan korporat ia sepatutnya menyediakan bagi pihak plaintif dan dikeluarkan oleh defendan kedua di bawah perjanjian. Plaintif juga memohon perintah bahawa defendan kedua membayar kepadanya jumlah yang telah diarahkan oleh penimbang tara mesti dibayar oleh defendan pertama kepada plaintif. Memandangkan award hanya diberikan selepas kedua-dua pihak telah siap hujahan mereka di dalam tindakan ini tetapi sebelum penghakiman diberikan, plaintif memohon untuk izin mengemukakan award sebagai keterangan selanjutnya untuk menyokong tuntutannya. Defendan-defendan membantah permohonan tersebut, antara lain, atas alasan-alasan: (i) memandangkan defendan kedua adalah bukan pihak kepada timbang tara dan tidak berpeluang untuk mempertikaikan

kandungan award tersebut, ia akan diprejudiskan dan dinafikan dengan keadilan semulajadi jika award diterima sebagai keterangan selepas akhir perbicaraan (ii) memandangkan plaintif tidak memohon untuk membuka semula kesnya atau memanggil penimbang tara untuk memberi keterangan, defendan kedua tidak dapat memeriksa balas penimbang tara atas award tersebut atau mematahkan keterangannya (iii) award tidak patut mempengaruhi mahkamah atau mengikat defendan kedua memandangkan penimbang tara tersebut telah melakukan kesilapan undang-undang yang serius dalam keputusannya (iv) memandangkan plaintif tidak memplid award tersebut di dalam penyata tuntutannya mahkamah tidak dapat menghakimi atas isu yang tidak diplid (v) percubaan untuk memasukkan award sebagai taktik untuk memperkukuhkan hujahan-hujahan plaintif dan menewaskan pembelaan defendan kedua dan (vi) plaintif patut menangguhkan perbicaraan tersebut atau menarik balik kesnya hingga selepas award diberikan. Plaintif, antara lain, menyatakan defendan pertama adalah subsidiari defendan kedua dan dua pengarah biasa kedua-dua defendan telah memberikan keterangan pada masa timbang tara.

Diputuskan, memberikan permohonan dan membenarkan defendan-defendan untuk memanggil balik saksi-saksi mereka atau memanggil saksi-saksi baru untuk memberikan keterangan berkaitan keterangan di dalam award:

(1) Oleh kerana plaintif telah memenuhi ketiga-tiga keperluan untuk menerima keterangan baru seperti yang ditetapkan di dalam kes *Ladd v Marshall* [1954] 3 All ER 745 mahkamah berpandangan bahawa ini adalah kes yang layak dan sesuai untuk membenarkan plaintif mengemukakan award tersebut (lihat perenggan 41).

(2) Award, setelah diberikan pada 3 Februari 2012, jelas tidak ada sama ada semasa pendengaran tindakan pada November 2011 atau semasa penghujahan lisan dalam jawapan pada 29 Disember 2011. Adalah penting untuk award dikemukakan sebagai sebahagian daripada keterangan pada perbicaraan memandangkan penimbang tara telah menentukan jumlah yang patut dibayar oleh defendan pertama kepada plaintif. Mahkamah juga berpandangan bahawa keterangan mengenai award tersebut adalah boleh dipercayai, walaupun ia mungkin tidak dipertikaikan (lihat perenggan 34, 35 & 37).

(3) Mahkamah berpandangan adalah tidak perlu untuk plaintif meminta membuka semula kesnya dalam permohonannya. Adalah tersirat di dalam permohonan untuk mengemukakan award bahawa kes plaintif akan dibuka semula memandangkan perbicaraan terdahulu telah selesai (lihat perenggan 40).

(4) Mahkamah tidak bersetuju dengan penghujahan bahawa award tidak boleh diterima sebagai keterangan kerana ia tidak diplidkan di dalam

penyata tuntutan. Award tidak diplidkan kerana ia bukan wujud pada masa penyata tuntutan tersebut difailkan (lihat perenggan 35).]

Notes

For cases on principles applied, see 7(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1855–1857.

Cases referred to

Datuk Seri Panglima Mohd Sari bin Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors [2009] 6 MLJ 643, CA (refd)

Ladd v Marshall [1954] 3 All ER 745, CA (folld)

Pernas Trading Sdn Bhd v Senali Construction Works Sdn Bhd [1991] 3 CLJ 439 (Rep), HC (distd)

Sanjay Mohasundram (Mohd Raihan Abd Khalip with him) (Kadir Andri & Partners) for the plaintiff.

Ringo Low (Ting Lee Ping with him) (Ringo Low & Associates) for the first defendant.

Manpal Singh Sacdev (Tan Weng Hung with him) (Manjit Singh Sachdev, Mohammad Radzi & Partners) for the second defendant.

Amelia Tee Abdullah J:

DECISION (ENCL 22)

[1] The plaintiff, *Bauer (M) Sdn Bhd*'s claim against the first defendant, *Embassy Court Sdn Bhd*, is for an order for specific performance requiring the first defendant to produce the corporate guarantee issued by the second defendant, Magna Prima Bhd, based on the terms of the draft corporate guarantee prepared by the plaintiff or such terms as may be deemed appropriate by the court. The plaintiff's claim against the second defendant is for an order that the second defendant indemnify or pay to the plaintiff such monies as may be determined by the arbitrator to be payable by the first defendant to the plaintiff.

[2] The hearing of the suit has been completed where the plaintiff had relied on the evidence of its sole witness, Thomas Samuel a/l CT Samuel. Whilst the first defendant did not call any witnesses, the second defendant had called a witness, namely Christopher Gerard Danker. The hearing was completed on 29 December 2011 and the case is now pending the decision of the court.

THE APPLICATION — ENCL 22

[3] Vide a summons in chambers (encl 22) the plaintiff has applied under the inherent jurisdiction of the court for leave to adduce the final award dated 3

February 2012 as further evidence in support of its claims. Briefly, the basis for the application is that on 3 February 2012, the arbitrator had delivered the final award in favour of the plaintiff and ordered a sum of RM18,718,966.28 to be paid by the first defendant to the plaintiff together with continuing interest at the rate of 8%pa from 4 February 2012 until the date of realisation. This final award was only delivered by the arbitrator on 3 February 2012 and was thus not available before 2 February 2012.

THE AFFIDAVIT IN SUPPORT — ENCL 21

[4] The summons in chambers (encl 22) is supported by the affidavit in support of *Thomas Samuel a/l CT Samuel* (encl 21). Thomas Samuel is the general manager of the plaintiff. In para 15 of encl 21, he states that the plaintiff and the first defendant had referred their substantial disputes to arbitration. As a preliminary issue, the arbitrator was asked to determine whether the second agreement had been entered into between the plaintiff and the first defendant on 12 September 2006. On 14 January 2010, the arbitrator had concluded that the second agreement was validly entered into between the plaintiff and the first defendant and as such was binding upon them. On 26 August 2010, the interim award dated 14 January 2010 has been registered as a judgment of the High Court. The first defendant lodged an appeal against the decision of the High Court dated 26 August 2010. However, the first defendant's appeal has dismissed by the Court of Appeal with costs on 8 February 2011.

[5] After the issue as regards the second agreement had been dealt with, the plaintiff and the first defendant proceeded with the arbitration on the other issues in respect of liability and quantum of damages. And on 3 February 2012, the arbitrator ruled in favour of the plaintiff. Briefly, the arbitrator ruled, inter alia, that:

(a) the September agreement exists with terms as set out in the interim award dated 14 January 2010;

(b) the plaintiff was not culpable for the delayed completion of the works in the contract. The delay was dominantly caused by the acts of prevention of the first defendant or its agents;

(c) there was no sectional completion date for the works in the contract. The time for completion of the whole works was set at large and to be completed within a reasonable time;

(d) the plaintiff had practically completed the works on 19 January 2007 when it determined its employment with the first defendant;

(e) the first defendant was not entitled to any liquidated ascertained damages (LAD), general damages, interest or costs;

(f) the first defendant was entitled to its counterclaim on rejected, substandard and uncompleted works for a sum of RM502,979.40 which is taken into consideration as set off in the common simplified final account;

(g) the first defendant shall pay to the plaintiff upon the day upon which either party shall have taken up the final award, the sum of RM13,276,164.02 being the plaintiff's entitlement for the balance amount for work done under the contract;

(h) the first defendant shall pay to the plaintiff interest at 8%pa for a sum of RM5,442,802.26 arising from the various amounts on its respective due date to 3 February 2012, the date of the final award. Interest at a simple interest rate of 8%pa will continue to run until the date of full realisation by the first defendant; and

(i) costs and expenses of the final award is taxed and settled by the arbitrator at RM61,385. The arbitrator shall withdraw this amount from the recovery deposit. The arbitrator shall determine by whom and in what manner these costs and expenses shall be paid; the first defendant shall, within 30 days from the date on which this award is taken up by either party, reimburse the plaintiff if the plaintiff has already paid the costs or any part thereof.

[6] It was further stated by Thomas Samuel that since the trial had been commenced and concluded on 16 and 17 November 2011 respectively whereas the final award was only delivered by the arbitrator on 3 February 2012, this evidence about the final award was not available before the trial concluded and the plaintiff could not have secured this evidence with reasonable diligence at the time when the trial was concluded.

[7] The deponent further states his belief that the final award dated 3 February 2012 is crucial to be adduced as part of the documentary evidence at the trial before judgment is pronounced as it has a direct impact on the plaintiff's claims against the first and second defendants in this suit. By the interim award, the arbitrator had decided that there was in existence the supplementary contract dated 12 September 2006 and one of its terms is that the first defendant is to provide a corporate guarantee to the plaintiff and the said corporate guarantee shall be issued by the second defendant. By the final award dated 3 February 2102, the first defendant is required to provide the corporate guarantee and the said guarantee shall be issued by the second defendant.

[8] The arbitrator had also quantified that an amount of RM18,718,966.28 is due and owing by the first defendant to the plaintiff. As the corporate guarantee is to be provided by the second defendant, this means that the second

defendant shall have to pay the plaintiff in the event that the first defendant fails to pay the sum as awarded by the arbitrator. During the trial, the first and second defendants had contended that no final award had been issued and that it was not clear whether any payments were due and owing to the plaintiff.

[9] And lastly, it is deposed that the further evidence in the form of the final award by the arbitrator is credible and the said award is final and binding on the parties.

THE SECOND DEFENDANT'S AFFIDAVIT IN REPLY — ENCL 23

[10] The affidavit in reply of the second defendant (encl 23) is affirmed by *Dato' Rahadian Mahmud bin Mohammad Khalil*, a director of the second defendant. In paras 5–6 of encl 23, the deponent states that the application should be dismissed with costs because it is made 'terlalu lewat, tidak teratur, tidak berasas, tidak adil dan/atau bertentangan dengan undang-undang'. Further, the final award sought to be produced would prejudice the interests of the second defendant.

[11] It was further deposed that:

(a) the application is made three months after the conclusion of the hearing and the plaintiff had never reserved its rights to adduce further evidence about the final award before closing its case. During oral submissions on 29 December 2011, the issue of there being no final award had been raised by counsel for the second defendant. When responding, counsel for the plaintiff had not placed on record that they would be adducing the evidence of the final award as further evidence;

(b) the plaintiff is attempting to adduce new facts and to improve upon its submissions;

(c) the arbitration only involved the plaintiff and the first defendant. The arbitration process had begun before the trial commenced and ended. The final award only binds the plaintiff and the first defendant. The second defendant is a stranger to the final award. The plaintiff's attempts to enforce the interim award as well as the final award against the second defendant is thus contrary to the principles of natural justice;

(d) if the plaintiff had intended to adduce the evidence of the final award, they could have obtained it with reasonable diligence before the trial commenced by either expediting the arbitration or else postponing this suit until the final award was obtained;

(e) the final award is not relevant and inadmissible as it had not been specifically pleaded in the statement of claim. The final award has also not been proved and therefore cannot be accepted as evidence;

(f) the arbitrator had committed serious errors of law in his decision and as such the final award should not influence the court or bind the second defendant. The plaintiff had terminated the two agreements (which is denied) and therefore they should not be entitled to specific performance;

(g) the plaintiff has no cause of action against the second defendant because:

(i) the final award had not been issued at the time when this action was filed;

(ii) the plaintiff's claim against the second defendant is vague; and

(iii) the plaintiff's claim against the second defendant is premature.

(h) both defendants had informed the court during the hearing that they would not be adducing any evidence as regards the quality of the plaintiffs work or any dispute which involves the architect or parties before the arbitrator in the interest of saving the court's time. As such, any attempt to adduce evidence as regards the final award now would severely prejudice the second defendant;

(i) the application is improper as the plaintiff is seeking to reopen their case but has not applied to call a fresh witness;

(j) the final award, if accepted as evidence, would change the nature and character of the plaintiff's claim which should not be allowed after the trial has been concluded. The plaintiff has also not applied to amend their statement of claim or applied for a fresh hearing.

THE PLAINTIFF'S AFFIDAVIT IN REPLY NO 1 — ENCL 24

[12] In para 5 of his affidavit in reply No 1 (encl 24), *Thomas Samuel* states that the issue of the breach of contract, the amount of works that had been carried out by the plaintiff and other issues in relation to the construction of the works were before the arbitrator and addressed in the final award. All the relevant witnesses appeared before the arbitrator who considered their testimony. Further, the first defendant is a subsidiary of the second defendant and was fully aware that the final award was to be issued.

[13] The plaintiff's claim is to seek an order of specific performance from the first defendant to procure a corporate guarantee from the second defendant and for an order that the second defendant make payment to the plaintiff of the monies found to be due and owing to the plaintiff. The final award confirms the amount that the first defendant has to pay to the plaintiff and, by extension, the amount that the second defendant has to pay to the plaintiff in the event

that the first defendant refuses to pay or is unable to pay. As such, the final award has a direct impact on the plaintiff's claims against the first and second plaintiffs.

THE PLAINTIFF'S AFFIDAVIT IN REPLY NO 2 — ENCL 26

[14] *Thomas Samuel*, on behalf of the plaintiff, has affirmed another affidavit in reply (encl 26) in which he states that the plaintiff's application is valid in law and that there was no delay in making this application. Further, the application, if allowed, would not prejudice the rights of the second defendant. The evidence which the plaintiff is seeking to adduce is the amount found by the arbitrator to be owed by the first defendant to the plaintiff and by extension the amount that the second defendant has to pay to the plaintiff in the event that the first defendant refuses to pay or is unable to pay. Whilst the arbitration had only involved the plaintiff and the first defendant, the final award has significant bearing on the second defendant as it evidences the amount which the second defendant will have to pay in the event that the first defendant refuses to pay or is unable to pay.

[15] In para 6 it is averred that the issue of the arbitrator's award not being published was raised during the course of the hearing and that the defendants were well aware at that time that the final award was being finalised by the arbitrator. Whilst the defendants had attempted to draw a distinction between an interim award and a final award, and had raised an issue of only the interim award being published, they are now objecting to the final award being adduced because the arbitrator had found that the first defendant owes the plaintiff a sum of more than RM18m. And in para 13 he states that the issue of the final award need not be specifically pleaded as it was only raised by the defendants during the course of the trial.

[16] The deponent states that the final award is material and significant evidence which was not previously available and which was alluded to during the course of the trial and must be considered as evidence by this court. The final award evidences the liability of the defendants. The plaintiff could not have procured the final award earlier as the arbitrator did not publish it earlier. The arbitration was significantly delayed by the first defendant's various requests for adjournments and delays in filing the written submissions as evidenced by the various letters from the first defendant's solicitors.

[17] In para 14 of his affidavit, the deponent has further pointed out that it is incorrect of the second defendant to say that they were not involved in the arbitration as both Dato' Mohd Rizal bin Abdullah and Mr Steven Lee attended the arbitration and gave evidence in their dual capacity as directors of both the first as well as the second defendants.

[18] In response to paras 16–17 of the second defendant's affidavit in reply, the deponent states that the agreement dated 12 September 2006 between the plaintiff and the defendants had not been terminated. The plaintiff had only determined the employment of itself under the first agreement and did not terminate the agreement dated 12 September 2006.

THE SECOND DEFENDANT'S AFFIDAVIT IN REPLY NO 2 — ENCL 25

[19] In response to encl 26, the second defendant has filed a second affidavit in reply (encl 25). In para 5, *Dato' Rahadian Mahmud bin Mohammad Khalil* has raised the issue of whether the rights of the second defendant had been prejudiced by the act of the plaintiff in attempting to adduce evidence of the final award through the 'pintu belakang' (back door) without following the rules and the law of evidence.

[20] The deponent has raised the issue of delay in making the application. Further he states that if the plaintiff had wanted to adduce the final award as evidence, it could, with reasonable diligence, have obtained the final award before this trial commenced or else it could have sought an adjournment of this case until the final award was received.

[21] In para 14, the deponent states that the plaintiff's application is but an afterthought and made as a strategy or tactic to defeat the second defendant's defences. And in para 18, he states that what was stated by the plaintiffs deponent is contrary to his oral testimony given during cross-examination when he agreed that the plaintiff had determined the contract and that this amounted to contempt of court.

[22] The deponent maintains that the second defendant was not involved in the arbitration and that both the interim award and the final award did not bind the second defendant. As such, it was averred that the second defendant would be prejudiced if the contents of the final award is adduced as further evidence in this court as they had no opportunity to dispute the contents of the said final award.

[23] In para 20, the deponent states that the plaintiff's application should not be allowed because the plaintiff had not applied to reopen its case, had not applied to call a new witness namely the arbitrator to testify as to the final award. As such, the second defendant would be deprived of its right to cross-examine the arbitrator and to produce evidence to rebut his evidence.

THE FIRST DEFENDANT'S AFFIDAVIT IN REPLY — ENCL 27

[24] The first defendant has filed an affidavit in reply (encl 27) through *Dato'*

Mohd Rizal bin Abdullah, a director of the defendants. In para 4 of the affidavit, the deponent voices his disagreement with the proposal to adduce the final award as further evidence on the grounds that 'keterangan Award Muktamad tersebut tidak mempunyai pengaruh penentu ke atas keputusan yang akan diberikan oleh Mahkamah yang mulia ini'.

DECISION

[25] In coming to a decision regarding the plaintiff's application for leave to adduce the final award as further evidence, the court has carefully perused the affidavits affirmed and filed by the various parties. The court has also had the benefit of reading the written submissions filed in respect of this application.

[26] The claims of the parties as seen in their pleadings and the background of this case are not in dispute and do not need recounting. The first area to consider is the law on leave to adduce further evidence.

[27] In the case of *Ladd v Marshall* [1954] 3 All ER 745, Lord Denning LJ had laid down the principles for the reception of fresh evidence. At p 748, His Lordship had stated as follows:

> In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it may not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible although it may not be incontrovertible.

[28] The principles as set out in *Ladd v Marshall* have long been followed by Malaysian courts. In the case of *Datuk Seri Panglima Mohd Sari bin Datuk Hj Nuar v Vee Seng Development Sdn Bhd & Ors* [2009] 6 MLJ 643, the Court of Appeal had reiterated the principles as laid down in *Ladd v Marshall*. And in addition, His Lordship Abdul Malik Ishak JCA had this to say at p 650:

> And according to three Malaysian Court of Appeal cases, *the conditions stipulated in Ladd v Marshall are to be read cumulatively and not disjunctively.* See *Ing Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong* [2001] 4 MLJ 461 (CA); *Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals* [2004] 4 MLJ 105; [2004] 4 CLJ 282 (CA); *Maxisegar Sdn Bhd v Silver Concept Sdn Bhd* [2005] 5 MLJ 1 (CA).
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> And *if the appellant defendant fails to satisfy one condition, he fails altogether.*
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> It must be emphasised that the discretion to admit fresh evidence is entirely that of the court to whom the application is made (*Kok Fook Sang v Juta Vila (M) Sdn Bhd & Ors* [1996] 2 MLJ 666 (CA)). (Emphasis added.)

[29] The court proposes to deal with each of the three requirements in turn.

THE FURTHER EVIDENCE WAS NOT AVAILABLE OR COULD NOT WITH REASONABLE DILIGENCE HAVE BEEN MADE AVAILABLE FOR USE AT THE TRIAL

[30] The trial was commenced and concluded on 16 and 17 November 2011 respectively. Written submissions were then exchanged and oral submissions in reply were heard on 21 December 2011. However, the final award was only delivered by the arbitrator on 3 February 2012. As such, the plaintiff submits that the evidence of the final award could not have been secured by them at the time when the trial was concluded.

[31] Learned counsel for the second defendant has submitted that the plaintiff could have obtained the final award with reasonable diligence. It was argued that the plaintiff was actively and closely involved in the arbitration hearing, which hearing was in progress even before the present suit was filed on 4 March 2011. In fact, the interim award was dated 14 January 2010.

[32] That being the case, the second defendant submits that the plaintiff had three options available to them as follows:

(a) wait until the final award is published before filing the present suit;

(b) postpone the full trial of the suit until the final award is published; or

(c) refrain from closing the plaintiff's case until the final award is published.

[33] The second defendant submits that the plaintiff had control of the proceedings and was at liberty to decide on the appropriate steps to be taken. It knew full well that the final award was pending even during the full trial on 16–17 November 2011. The second defendant submits that the fact that the final award was never brought up in evidence during the hearing would point to the fact that the idea to bring in the final award was but an afterthought and that this was conceived of after the final oral submissions on 29 December 2011 and that before that date, the plaintiff had never intended it to be part of the evidence at the trial.

[34] In respect of this first requirement, the court finds that the requirement is satisfied as the final award, being delivered by the arbitrator on 3 February 2012, was clearly not available either during the hearing in November 2011 or during the oral submissions in reply on 29 December 2011. The court is unable to accept the argument of learned counsel for the second defendant that the second defendant could have obtained the final award with reasonable diligence in time for the hearing before this court. The court does not believe

that any party should be able to push the arbitrator for an earlier award. The court accepts that the date the final award was delivered was the earliest date that the plaintiff could have obtained it for production before this court.

WHETHER THE EVIDENCE IS SUCH THAT, IF GIVEN, WOULD PROBABLY HAVE AN IMPORTANT INFLUENCE ON THE RESULT OF THE CASE, ALTHOUGH IT MAY NOT BE DECISIVE

[35] The plaintiff contends that the final award is crucial to be adduced as part of the documentary evidence at the trial before the court pronounces judgment. Although the second defendant has submitted that the answer to this question is in the negative as the final award was never pleaded in the statement of claim and the court cannot adjudicate on an issue that was never pleaded, the court is unable to agree with this submission. The final award was not pleaded because it was not in existence at the time when the statement of claim was filed. What the plaintiff is claiming as can be seen in para 20 is an order for specific performance against the first defendant requiring the first defendant to produce a corporate guarantee issued by the second defendant, and as against the second defendant, an order that it indemnify and/or pay to the plaintiff such monies as are determined by the arbitrator to be payable by the first defendant to the plaintiff. It is in this context that the final award becomes crucial if the arbitrator has made a determination in the final award on the sum that is payable by the first defendant to the plaintiff.

[36] As such, the court finds that the second requirement as laid down in *Ladd v Marshall* has been satisfied.

WHETHER THE EVIDENCE IS CREDIBLE, ALTHOUGH IT MAY NOT BE INCONTROVERTIBLE

[37] As regards the third requirement, although the second defendant has submitted that there are mistakes of law and fact in the final award which makes it to be not safe and not credible, the court is unable to accept that a final award of an arbitrator is prima facie incredible. The requirement in *Ladd v Marshall* is merely that the evidence must be credible although it may not be incontrovertible. Thus, on the strength that the evidence sought to be adduced as fresh evidence is a final award of an arbitrator, the court is of the view that the evidence of the final award is credible, although it may not be incontrovertible. As such, the court finds that the third requirement has also been satisfied.

[38] Having found all three requirements in *Ladd v Marshall* to have been satisfied, the court has the discretion whether to allow the present application. The court is well aware of the decision in *Pernas Trading Sdn Bhd v Senali*

Construction Works Sdn Bhd [1991] 3 CLJ 439 (Rep) where Peh Swee Chin J (as he was then) had opined that in his view the discretion whether to allow the recall of a witness should never be exercised when it is made after an applicant has closed its case, a *fortiori* after he has made his final submissions or after final submissions has been made by both parties. However, in *Pernas Trading*, the evidence was easily available earlier and could have been easily adduced earlier. The position is different from our present case where the final award of the arbitrator had not been delivered by the arbitrator during the hearing of the case, or even at the time of the oral submissions in reply on 29 December 2011. The court is of the view that the case of *Pernas Trading* can be easily distinguished from our instant case.

[39] And lastly, the court has considered the concerns of the second defendant that the application is not about re-opening the case but about adducing fresh evidence. Learned counsel for the second defendant takes issue with the fact that the summons in chambers in encl 22 makes no mention of the plaintiff wanting to reopen its case.

[40] On this issue, the court is of the view that the plaintiff's prayer (1) for leave to issue the final award dated 3 February 2012 is sufficient and that the plaintiff need not necessarily plead that it is asking for leave to reopen its case. The court finds that it is implicit in the prayer to adduce the final award that the plaintiff's case would have to be reopened since the entire hearing had earlier been completed.

[41] In light of the court's finding that the three requirements as set out in *Ladd v Marshall* have been satisfied, the court is of the view that this is a fit and proper case for the court to exercise its discretion to allow the plaintiff to adduce the final award dated 3 February 2012. In the interests of justice, the court, in allowing the plaintiffs application, is also allowing the defendants to recall their witnesses (if any) or to call fresh witnesses, but only insofar as it relates to the evidence of the final award. Costs are to be costs in the cause.

Application granted and defendants allowed to recall their witnesses or call fresh witnesses to testify with regard to evidence in award.

Reported by Ashok Kumar